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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. DEVIN JEROME DENMARK et al., Defendants and Appellants.	B210662 (Los Angeles County Super. Ct. No. NA077113)

APPEALS from judgments of the Superior Court of Los Angeles County. Arthur H. Jean, Jr., Judge. Affirmed.

Lea Rappaport Geller, under appointment by the Court of Appeal, for Defendant and Appellant Devin Jerome Denmark.

William D. Farber, under appointment by the Court of Appeal, for Defendant and Appellant Lamond Travione McCoy.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Lance E. Winters, Deputy Attorneys General, for Plaintiff and Respondent.

Devin Jerome Denmark (Denmark) and Lamond Travione McCoy (McCoy) were tried before a jury and convicted of second degree robbery in violation of Penal Code section 211.[1] Subsequently, the trial court found true the allegations that McCoy had suffered a prior conviction for which he served a prison term, and that the conviction qualified as a prior serious felony conviction and a prior strike. (§§ 667, subds. (a)-(i); 667.5, subd. (b); 1170.12, subds. (a)-(d).) Denmark and McCoy appeal their convictions on the following grounds: (1) the prosecutor violated their right to equal protection by exercising peremptory challenges based on racial discrimination; and (2) the trial court erred by failing to dismiss a juror[2] who could not sufficiently perform his duties. In addition, McCoy argues that the trial court violated section 1385 and *People v. Superior Court* (*Romero*) (1996) 13 Cal.4th 497 (*Romero*) when it refused to strike his 1998 conviction for robbing a federal credit union in violation of title 18 United States Code section 2113(a)-(d).

We find no error and affirm.

FACTS

In 2008, Denmark went into a donut shop in Long Beach, pointed a gun at the shop's employee and took cash from the cash register. McCoy drove Denmark away from the scene of the crime. They were arrested and charged with second degree robbery.

During voir dire, a Black juror—juror No. 3—was asked to answer general questions posed to all jurors. He stated: "I stay in San Pedro. I am child care. Not married. Two year old daughter and no experience on a jury." Later, the trial court suggested that the defense excuse juror No. 3, reminding the defense that juror No. 3 had child care issues. Neither defense counsel exercised a peremptory challenge, but the prosecutor did. Denmark's counsel asked to be heard without specifying a reason and the trial court denied the request.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] For ease of reference, we refer to prospective jurors as jurors.

In other colloquy, juror No. 1 stated that he was a therapist who worked on behavioral modification for children in a psychiatric hospital. Juror No. 11 indicated that he was a licensed psychiatric technician. He described himself as a nurse for the mentally ill. The prosecutor exercised peremptory challenges on juror No. 1 and juror No. 11. Both were Black. Denmark and McCoy objected based on *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*). The trial court noted that there were still Black jurors on the panel. It did not ask for but accepted the prosecutor's explanation that she removed the two jurors because they worked in the psychiatric field and might not be fair and impartial.

Juror No. 8 was Black. In response to a general inquiry from the trial court, juror No. 8 stated that he worked for the County of Los Angeles as a recreation service leader. He was not married, did not have any relatives in law enforcement or any children, and he had never served on a jury. He indicated that his father had been the victim of car theft.[3] On three occasions, the prosecutor accepted the jury panel with juror No. 8. Later in the proceeding, however, the prosecutor chose to have juror No. 8 removed. Denmark's counsel asserted a *Wheeler* motion. The trial court stated: "You . . . wanted to be heard after an exercise of a peremptory challenge as to juror No. 3. I denied you coming up. I knew . . . that's what you wanted to do." Denmark's counsel said, "Yes." The trial court thought juror No. 3 had time issues or child care issues. But as to juror No. 8, the trial court perceived a reason to make an inquiry. The prosecutor replied: "My reason for excusing juror No. 8, he indicated . . . that he was in college. And to be totally honest, he looked incredibly young. And I was concerned for his life experience to be a

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[3] According to Denmark, juror No. 8 said he was a student. But Denmark did not provide a record citation. A review of the reporter's transcript reveals that C.I., juror No. 7208, claimed to be in school. Another juror, L.R.J., stated that he had to go to school in a week. He was juror No. 5242. D.B., juror No. 8100, said he had to attend an eight-hour class the following Monday. Only when the jurors were placed in the jury box were they identified by seat numbers 1 through 12. The original juror No. 8 was S.M., a woman. Denmark's attorney excused the original juror No. 8. Soon after, the prosecutor objected because Denmark excused five White females, one White Male, and one Asian female. There is no indication that a juror in seat No. 8 was a college student.

fair and impartial juror. And he looked to be barely 18." The trial court noted that there were two Black jurors left and denied the motion.

The case proceeded to trial. During a break from the prosecutor's direct examination of a witness, the trial court received a note from juror No. 12 that stated: "I would like to inform that I recognize both defendants. I have seen them at the Bicycle Casino where I work. Don't know their names. Yesterday I didn't recognize them at first. Near the end of the day yesterday I am a hundred percent sure. I have concerns if they recognize me."

The trial court asked juror No. 12 if seeing the defendants at the Bicycle Casino would have an impact on his ability to make a fair decision. He said no and verified that he could continue as a juror. The trial court asked if the juror was concerned about his safety. Juror No. 12 said he was. When asked if his concern would impact his decisionmaking, he stated: "To tell you I am concerned, so I don't know. No." The trial court asked if juror No. 12 was "sure" and he said "yeah." As a follow up, the trial court stated: "If at any time you become concerned, you let me know. Concern to the point where you couldn't be fair to everybody." Both defense counsel expressed doubt that juror No. 12 could be fair and made a motion for him to be excused. The trial court responded: "My interpretation of this man's reaction here was that he can be a fair juror. And I am not going to dismiss him."

Denmark and McCoy were convicted of second degree robbery.

In the sentencing memo for McCoy, the People asked the trial court to sentence McCoy to 15 years. The People averred: The manner in which the crime was carried out indicated planning, sophistication and professionalism. McCoy parked his vehicle in an alley behind the donut shop and the location was approximately one block away from the entrance to a freeway. When leaving the scene, McCoy attempted to evade the police by swerving back and forth on the freeway at speeds in excess of 90 miles per hour. McCoy had a prior conviction for bank robbery. Both the current case and prior case involved violent conduct and the use of weapons. The violent conduct indicates that McCoy is a danger to society.

McCoy filed a motion to dismiss his 1998 bank robbery conviction under section 1385 and *Romero*. He argued that the bank robbery occurred when he was young. As for the donut shop robbery, he recognized that it was a serious crime but stated that he did not enter the donut shop and did not possess a weapon, and at most he drove the getaway car. He urged the trial court to conclude that he did not fall within the spirit of the Three Strikes law.

The trial court denied the motion, stating: "[McCoy] is on parole for bank robbery. He is out committing a new robbery."

Denmark was sentenced to five years in state prison. McCoy was sentenced to 15 years in state prison after receiving five years on the robbery conviction, a doubling of that sentence under section 1170.12, and an additional five years pursuant to section 667, subdivision (a)(1).

These timely appeals followed.

DISCUSSION

A. Denial of the *Wheeler* motions.

Denmark and McCoy challenge the trial court's denial of the *Wheeler* motions as to juror Nos. 1, 8 and 11.

The use of a peremptory challenge to a juror based on race violates a defendant's right to a fair trial under the California Constitution and equal protection under federal Constitution. (*Wheeler*, *supra*, 22 Cal.3d at pp. 276–277; *Batson v. Kentucky* (1986) 476 U.S. 79, 89 (*Batson*).) In order to prevent *Wheeler/Batson* misconduct, a defendant must promptly object and present a prima facie case that a dismissed juror is a member of a cognizable group and was dismissed because of group membership. (*Wheeler*, *supra*, 22 Cal.3d at p. 280.) If the defendant succeeds, the burden then shifts to the prosecution to articulate a race-neutral explanation. (*Batson*, *supra*, 476 U.S. at p. 94; *Wheeler*, *supra*, 22 Cal.3d at pp. 281–282.) In the third step, the trial court must determine whether the defendant proved impermissible discrimination. (*Hernandez v. New York* (1991) 500 U.S. 352, 358 (*Hernandez*).)

Where, as here, "a prosecutor has offered a race-neutral explanation for the peremptory challenges and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of whether the defendant had made a prima facie showing becomes moot." (*Hernandez, supra,* 500 U.S. at p. 359.) Thus, our task is to apply the substantial evidence test to the trial court's findings that the prosecutor did not engage in unlawful racial discrimination. (*People v. Gonzales* (2008) 165 Cal.App.4th 620, 627 (*Gonzales*).)

If a prosecutor's explanation for a peremptory challenge is plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings. (*Gonzales, supra,* 165 Cal.App.4th at p. 628.) But if the explanation is unsupported by the record or inherently implausible, the trial court must engage in sufficient inquiry to ferret out the truth. (*Id*. at p. 629.) According to Denmark, the prosecutor's explanation for the peremptory challenges to juror No. 1 and juror No. 11 was implausible because the prosecutor did not object to a White juror who was a psychiatric technician and who was therefore similarly situated. (*Snyder v. Louisiana* (2008) 552 U.S. 472.) Denmark contends that the trial court should have investigated this implausibility but failed to do so. He is essentially arguing that the trial court's ruling is not supported by substantial evidence. But juror No. 1 and juror No. 11 were the only jurors who worked in the psychiatric field. Having failed to show that the explanation was implausible, Denmark failed to show trial court error.

Continuing on, Denmark argues that the record did not support the explanation for the removal of juror No. 8. (*Gonzales, supra,* 165 Cal.App.4th at p. 631.) This issue is muddied because juror No. 8 never stated that he was in college, nor did he state his age. Nothing suggested that his employment was not a responsible and permanent position. (*Id*. at pp. 631–632.) Further, the prosecutor did not ask "any individual questions about any life experiences. The prosecutor did not ask [her] any individual questions at all. The prosecutor did not explain, nor did the trial court ask [her] to explain, what specific life experiences [she] was looking for in a juror or that [she] found [juror No. 8] lacked." (*Id*. at p. 632.)

On the other hand, we accept the prosecutor's assertion that juror No. 8 looked barely 18 because Denmark did not challenge it below. (*Gonzales, supra*, 165 Cal.App.4th at p. 631.) Also, juror No. 8 was not married and did not have children. These facts suggest that juror No. 8 had limited life experience, a fact which is a permissible race-neutral reason for removal. (*People v. Perez* (1994) 29 Cal.App.4th 1313, 1328.) In *People v. Sims* (1993) 5 Cal.4th 405, for example, the prosecutor purportedly excused one of several Black jurors because she was "27 years of age, appeared too young and to lack sufficient experience in exercising responsibility." (*Id*. at p. 429.) The court noted that "[a]lthough [the juror's] immaturity cannot be verified from the cold record, absent a showing by defendant to the contrary we must 'rely on the good judgment of the trial court[]' to evaluate whether the prosecutor's reason was bona fide. [Citation.]" (*Id*. at p. 430.) In our view, juror No. 8's youthful appearance and apparent lack of family experience amounted to substantial evidence that the prosecutor's decision was race-neutral.

B. The procedure regarding juror No. 3.

McCoy contends that the trial court erred when it refused to allow his counsel to make a *Wheeler* motion regarding the peremptory challenge as to juror No. 3 or to make a complete record. We disagree. When the parties were discussing the *Wheeler* motion as to juror No. 8, the trial court mentioned juror No. 3. The parties had ample opportunity at that time to make a record. Nonetheless, neither Denmark's nor McCoy's counsel offered any argument as to juror No. 3.

In any event, the trial court impliedly found that the record did not support a prima facie case of racial bias on the theory that it demonstrated ample grounds upon which the prosecutor might have relied. (*People v. Farnam* (2002) 28 Cal.4th 107, 137.) It noted that juror No. 3 had a child care conflict. This implied finding was supported by juror No. 3's statements during voir dire that he was a single parent with a two-year old daughter and that he provided child care. Substantial evidence supported the trial court's decision not to hear argument.

C. The objection to juror No. 12.

Denmark and McCoy argue that the trial court was required to remove juror No. 12 and committed error by failing to do so.

If a juror is unable to perform his duty, a trial court "may order the juror to be discharged." (§ 1089.) "Once a trial court is put on notice that good cause to discharge a juror may exist, it is the court's duty 'to make whatever inquiry is reasonably necessary' to determine whether the juror should be discharged. [Citation.]" (*People v. Espinoza* (1992) 3 Cal.4th 806, 821.) "A juror's inability to perform '"must appear in the record as a 'demonstrable reality' and bias may not be presumed." [Citations.]' [Citation.] We review the trial court's determination for abuse of discretion and uphold its decision if it is supported by substantial evidence. [Citation.]" (*People v. Bennett* (2009) 45 Cal.4th 577, 621.)

Juror No. 12 stated that seeing Denmark and McCoy at the Bicycle Casino and being concerned about his safety would not impact his ability to make a fair decision. Interpreting juror No. 12's reaction—including physical demeanor to which we are not privy—the trial court concluded that he could perform his duty. We must resolve all conflicts in the evidence in favor of the prevailing party and draw all reasonable inferences in a manner that upholds the verdict. (*Holmes v. Lerner* (1999) 74 Cal.App.4th 442, 445.) Following this rule, we conclude that the evidence supported the trial court's finding that juror No. 12's ability to perform as a fair juror had not been compromised. The trial court ruled within the bounds of its discretion and the motion to juror No. 12 was properly denied.

D. Denial of McCoy's motion to strike his prior conviction.

According to McCoy, the trial court abused its discretion by failing to consider the relevant factors when ruling on his *Romero* motion. Upon review, we conclude that McCoy failed to demonstrate error.

Our Supreme Court instructs that a trial court ruling on a *Romero* motion "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background,

character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies. If it is striking or vacating an allegation or finding, it must set forth its reasons in an order entered on the minutes, and if it is reviewing the striking or vacating of such allegation or finding, it must pass on the reasons so set forth." (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*).) We review the denial of a *Romero* motion for an abuse of discretion. (*Id*. at p. 162.) To prevail on appeal, a defendant must establish that the denial of his *Romero* motion and subsequent sentencing was irrational or arbitrary. (*People v. Romero* (2002) 99 Cal.App.4th 1418, 1434.) In conducting our review, we presume that a trial court "considered all relevant factors in denying a motion to strike. [Citation.]" (*People v. Pearson* (2008) 165 Cal.App.4th 740, 749.)

McCoy maintains that the trial court failed to evaluate his background and prospects and decide whether he fit within the spirit of the Three Strikes law. Instead, says McCoy, the trial court only considered the nature of the 1998 conviction and the current conviction when ruling. But McCoy forgets that we presume that all relevant facts were properly assessed, and that a trial court is required to set forth its reasons only if it strikes a prior conviction.

Based on the record and reasonable inferences available to us, the trial court's ruling was neither irrational nor arbitrary. McCoy was on parole in connection with the 1998 bank robbery when he was arrested for robbery of the donut shop. Though McCoy was not convicted of any crimes between 1998 and 2008, he was presumably in prison during that time.[4] His decade long clean record therefore does not reveal anything about his character or prospects.[5] McCoy's decision to commit a crime while on parole is the

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[4] The People represent that McCoy was given a 121-month sentence for his federal bank robbery conviction.

[5] In his opening brief, McCoy stated: "While [McCoy] previously had been arrested on numerous occasions before the current crime, he had never been convicted of any other felony. He had only one misdemeanor conviction. . . . As a juvenile, he had 5

only insight into his character that we have. He appears to be a recidivist, the type of defendant the Three Strikes law is for.

DISPOSITION

The judgments are affirmed.

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_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ

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sustained petitions with 3 camp commitments and 2 unknown dispositions." McCoy provided citations to the clerk's transcript. The pages he refers to do not exist in the clerk's transcript on file.